STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 28, 2003
v	No. 232168 Jackson Circuit Court
BEN DAVIS PIZANO, a/k/a, BEN DAVID PIZANO, Defendant-Appellant.	LC No. 00-004060-FC

Before: O'Connell, P.J., and Griffin and Markey, JJ.

PER CURIAM.

Defendant was convicted on three counts of felony murder, MCL 750.316(1)(b), as well as the predicate felony of arson of a dwelling house, MCL 750.72, after a joint trial before separate juries with his brother and codefendant, Jack Pizano. Defendant was sentenced to three concurrent mandatory life prison terms. Defendant appeals by claim of right. We affirm.

Defendant first argues that the trial court erred by admitting hearsay statements and that his rights secured by the Confrontation Clause were violated. We disagree. Because the grounds for objection at trial and the grounds raised on appeal must be the same, defendant has preserved his argument based on the rules of evidence but not an objection based on the Confrontation Clause. MRE 103(a)(1); *People v Kilbourn*, 454 Mich 677, 684-685; 563 NW2d 669 (1997); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

Prior to trial, the prosecutor filed a motion in limine seeking a ruling admitting certain hearsay statements made by two of the victims, Mrs. Ortiz, and to a lesser extent, Mr. Ortiz. The hearsay statements of Mrs. Ortiz covered three areas: (1) a description of an argument she had with Jack Pizano's wife, Diana Pizano, during which Jack Pizano was alleged to have made threats; (2) statements that Mrs. Ortiz told the Pizanos during the argument that she intended to obtain custody of Diana's children, Mrs. Ortiz' grandchildren; and (3) statements by Mrs. Ortiz concerning her fear and that if anything happened to her Jack Pizano would be responsible.

The trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion, *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001). The trial court did not clearly abuse its discretion by admitting the hearsay statements in question. Generally, all relevant evidence is admissible and irrelevant evidence is not. MRE 402; *People v Starr*, 457

Mich 490, 497; 577 NW2d 673 (1998). To be relevant, evidence must have "any tendency to make the existence of any fact that is of consequence . . . more probable or less probable." MRE 401; *People v Sabin (After Remand)*, 463 Mich 43, 56-57; 614 NW2d 888 (2000). In the present case, the trial court found that the evidence was relevant to a motive for murder, and motive is always relevant in a murder case. *Sabin (After Remand)*, *supra* at 68; *People v Rice (On Remand)*, 235 Mich App 429, 440; 597 NW2d 843 (1999). The trial court relied on three alternative exceptions to the rule against hearsay and only one need be applicable for the evidence to be properly admitted. See, e.g., *Sabin (After Remand)*, *supra* at 56 (theory of multiple admissibility), and *Starr*, *supra* at 501 (only one theory need be proper).

One exception relied on by the trial court was MRE 803(2), which permits "hearsay testimony that would otherwise be excluded because it is perceived that a person who is still under the 'sway of excitement precipitated by an external startling event will not have the reflective capacity essential for fabrication so that any utterance will be spontaneous and trustworthy.'" *People v Smith*, 456 Mich 543, 550; 581 NW2d 654 (1998), quoting 5 Weinstein, Evidence (2d ed), § 803.04[1], p 803-19. There are two requirements for the admission of an excited utterance: (1) that a startling event occurs, and (2) that the resulting statement is made while under the excitement caused by the event. *Smith*, *supra*; *People v Layher*, 238 Mich App 573, 582; 607 NW2d 91(1999), aff'd 464 Mich 756; 631 NW2d 281 (2001). Although the length of time between the startling event and the statements is an important factor to consider in determining admissibility, it is not controlling. Rather, the key question is whether the declarant is still under the stress of the event, and the trial court is accorded wide discretion in making that preliminary factual determination. *Smith*, *supra* at 551-552; *Layher*, *supra* at 582.

In the present case, the startling event was the argument between Mrs. Ortiz and Diana Pizano, participated in by defendant Jack Pizano, on the Tuesday evening before the fire, which occurred around 4:00 a.m. Friday morning. The testimony of Robert Parker established that Mrs. Ortiz was so upset she fell to the ground and was sobbing for almost two hours when she returned home after the argument. The next day, Wednesday, Mrs. Ortiz made the statements at issue to her daughter, Mary Jane Ramon, and her granddaughter, Sandra Conner. Conner, the first witness to speak to Mrs. Ortiz on Wednesday, testified that her grandmother was upset and crying but eventually was able to tell her about the argument. Mrs. Ortiz repeated her statements when Mary Jane Ramon, Sandra's mother, arrived. Thus, the record clearly establishes the two criteria for admission of Mrs. Ortiz' hearsay statements to Ramon and Conner under MRE 803(2). The trial court did not abuse its discretion.

Mrs. Ortiz' statements to Amy Nelson on Thursday, about forty-eight hours after the argument, present a closer question of admissibility under MRE 803(2). By that time, Mrs. Ortiz added a fabrication to her statements, which was that she had reported the argument to the police, in the hope that Nelson would later tell her mother and stepfather, Diana and Jack Pizano. The fabrication itself was not hearsay admitted to prove the truth of the matter asserted, that the incident was reported to the police, but rather as further evidence of Mrs. Ortiz' fear. Thus, Mrs. Ortiz' statements to Nelson clearly relate to the major stressor she was still experiencing from the argument – her fear of Jack Pizano. The trial court's decision on close evidentiary questions ordinarily cannot be an abuse of discretion. *Layher*, *supra* at 761; *Smith*, *supra* at 550.

The trial court, however, may exclude relevant, admissible evidence when its probative value is substantially outweighed by the danger of unfair prejudice. MRE 403; *People v Fisher*, 449 Mich 441, 451; 537 NW2d 577 (1995). Of course, "unfair prejudice" does not simply mean "damaging." *Id.*; *People v Mills*, 450 Mich 61, 75; 537 NW2d 909, modified & remanded 450 Mich 1212; 539 NW2d 504 (1995). Rather, unfair prejudice means evidence that has a high risk to sway the jury based on extraneous matters such as bias, prejudice, or sympathy. *Fisher, supra* at 452; *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001). Here, the trial court did not abuse its discretion by finding that the evidence should not be excluded under MRE 403, noting that because the voices of the victims had been silenced in a circumstantial case, the evidence of motive was highly relevant and not substantially outweighed by the danger of unfair prejudice. *Fisher, supra* at 453. Because the statements were admissible as excited utterances and their probative value was not substantially outweighed by the danger of unfair prejudice, we need not address the other grounds the trial court cited for admissibility.

Further, because the trial court did not abuse its discretion in admitting the hearsay at issue under MRE 803(2), defendant's unpreserved claim that his Confrontation Clause rights were violated must fail. In *Ohio v Roberts*, 448 US 56, 66; 100 S Ct 2531; 65 L Ed 2d 597 (1980), the Supreme Court noted that the "hearsay rules and the Confrontation Clause are generally designed to protect similar values," quoting *California v Green*, 399 US 149, 155; 90 S Ct 1930; 26 L Ed 2d 489 (1970), and "stem from the same roots," quoting *Dutton v Evans*, 400 US 74, 86; 91 S Ct 210; 27 L Ed 2d 213 (1970), and thus

> when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. [*Ohio v Roberts, supra*, 448 US at 66.]

In the present case, MRE 803(2) is a "firmly rooted" hearsay exception, *White v Illinois*, 502 US 346, 355-356, n 8; 112 S Ct 736; 116 L Ed 2d 848 (1992), and therefore, statements that satisfy this rule carry sufficient indicia of reliability to satisfy the Confrontation Clause "without more." *Roberts*, *supra* at 448 US 66; *Ortiz, supra* at 310. Thus, plain error affecting defendant's substantial rights did not occur. *People v Carines*, 460 Mich 750, 763, 774; 597 NW2d 130 (1999).

Finally, defendant argues that the trial court erred in failing to instruct the jury on second-degree murder as a necessarily included offense of first-degree murder. However, defendant waived any claim of error by specifically requesting the trial court not to instruct the jury on second-degree murder. *People v Riley*, 465 Mich 442, 448-449; 636 NW2d 514 (2001); *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Defendant's actions constituted an "intentional relinquishment or abandonment of a known right," thus waiving and extinguishing any alleged error. *Id.*, quoting *Carines, supra* at 762, n 7, quoting *United States v Olano*, 507 US 725, 733; 113 S Ct 1770; 123 L Ed 2d 508 (1993).

Affirmed.

/s/ Peter D. O'Connell
/s/ Richard Allen Griffin
/s/ Jane E. Markey